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Supreme Court, U.S.
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No. 92-1915

In The

Supreme Court of the United States

October Term, 1992

YOUELL & COMPANIES AND
INSURANCE COMPANY OF NORTH AMERICA,

Petitioners,

v.

GETTY OIL COMPANY AND TEXACO INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Is a summary judgment movant denied due process of law when, in an appeal by the non-movant from the granting of the summary judgment, the highest court of a state construes a document as unambiguous against the construction requested by the movant, and *remands* the case to the trial court for further proceedings consistent with the opinion?

The Supreme Court of Texas did *not* grant Respondents' motion for partial summary judgment, as represented by Petitioners.

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STATEMENT OF THE CASE

Respondents' action as originally instituted against Petitioners ("INA" and "Youell") was essentially an insurance coverage case combined with a breach of contract case against NL Industries Inc. ("NL") for its refusal to extend to Getty the coverages of NL's liability policies with INA and Youell, to protect Getty as an additional insured. The language creating the duties on which the action was based is found in a contract between Getty and NL.

Petitioners filed a motion for summary judgment claiming, among other things, that as a matter of law the contract language should be construed in such a way as to pretermit the action entirely. Respondents had previously filed a motion for partial summary judgment based upon a contrary construction which unambiguously existed as a matter of law.[1] Respondents' motion was denied by the trial court. While the Petitioners' motion was pending, a "mini-trial" was held to determine whether the contract language "was part of an agreement between NL and Getty" at a particular time. The jury found for Respondents.[2]

The trial court then granted Petitioners' summary judgment motion on three grounds: (1) the contract should be construed so as to make the additional insured language an indemnity; (2) an anti-indemnity statute applied; and (3) *res judicata* and collateral estoppel applied.

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[1] See Respondents' Appendix A.

[2] See Respondents' Appendix B.

Respondents' arguments concerning the unambiguous construction of the contract language, first made in their motion for partial summary judgment, were a part of the appellate record as responses to Petitioners' motion, contrary to Petitioners' representation.[3]

The Texas Fourteenth Court of Appeals affirmed Petitioners' summary judgment on *res judicata,* but rejected Petitioners' construction of the contract language.[4] The Supreme Court of Texas upheld the judgment as to NL on *res judicata* grounds, but sustained the court of appeals opinion on the contract construction issue, agreeing with Respondents' contention that the language unambiguously separated the insurance and indemnity provisions.[5]

Despite Petitioners' many assertions to the contrary in their argumentative "Statement of the Case," the Texas Supreme Court did not grant Respondents' motion for partial summary judgment. The opinion and judgment of the court state that the case is remanded for further proceedings consistent with the opinion.[6] Respondents

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[3] Such matters, by specific trial court order (see Respondents' Appendix C), were included in Petitioners' summary judgment record and were thereafter specifically included in the appellate record (see indexed items 50, 66, 68 and 77 in the Amended Designation of Transcript, Respondents' Appendix D). (In Texas, in an appeal from a summary judgment, the "Transcript" is the appellate record, except for depositions which may be sent up with the record.)

[4] See Petitioners' Appendix D, pages 7-9.

[5] See Petitioners' Appendix A, pages 23-24.

[6] The judgment says "in conformity with." See Petitioners' Appendices A, page 29; B (no page numbers given).

were not *granted* any affirmative relief, as Petitioners' misrepresentation suggests. The only result in the supreme court was a reversal and remand for further proceedings.

Further, responding to Petitioners' argument in their Statement of Case (see Petition, page 4) that " . . . it has never been determined that a contract exists or that it applies to the underlying circumstances," the verdict of the jury (Respondents' Appendix B) speaks for itself.

SUMMARY OF RESPONDENTS' ARGUMENT: REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

1. The question presented is not within the considerations governing review under Supreme Court Rule 10 because no conflict is shown with the decision of another state court of last resort or of a United States court of appeals, the case does not involve an important question of Federal law which has not been, but should be, settled by this Court and the opinion does not conflict with applicable decisions of this Court.

2. In their statement of the question presented, and in their statement of the case, Petitioners misrepresent the result in the Supreme Court of Texas as the granting of a *sua sponte* partial summary judgment for Respondents, when in actuality the case was reversed and remanded to the trial court for further proceedings.

3. The circumstances of which Petitioners complain present no deprivation of due process of law because Petitioners (a) present no material fact question as to which a hearing is required and therefore have no protected interest; (b) have not shown a deprivation in the absence of the degree of finality represented by a final judgment; (c) placed the issue before the court; and (d) were given adequate notice and opportunity to respond to contrary constructions of the contract language.

4. Petitioners' novel due process theory would deprive courts of their inherent power to declare matters of law and would harm the efficient administration of civil justice.

ARGUMENT

1. THE QUESTION PRESENTED IS NOT WITHIN THE CONSIDERATIONS EXPRESSED IN RULE 10.

Petitioners have not attempted to address the considerations expressed in Supreme Court Rule 10.1(b) or (c). They have not attempted to show any conflict with another state court of last resort or a United States court of appeals or this Court. They do not attempt to suggest how the question presented is "an important question of federal law which has not been, but should be, settled by this Court, . . . "

Particularly because Petitioners have misrepresented the result below by claiming that the Texas Supreme Court *granted* Respondents' motion for partial summary

judgment, but even if the question as restated by Respondents is fully considered, the issue does not present the serious due process problem claimed by Petitioners. A construction of a document as unambiguous, coupled with a remand to the trial court for further proceedings, simply does not rise to the level of a deprivation of due process of law. As shown in the paragraphs to follow, no "important question of federal law" has been presented.

2. MISREPRESENTATION OF THE RESULT BELOW ALONE JUSTIFIES DENIAL OF THE WRIT.

The correct result below is reflected in Petitioners' own Appendix.[7] Petitioners have attempted to invoke the jurisdiction of this Court by making a statement – many times – which is palpably untrue. They have not couched their question and their argument on the proposition that the Texas Supreme Court merely construed the contract as Respondents contended it should be construed. They have not argued that the *effect* is as Respondents would have it had their motion been granted. They have stated as fact that the Texas Supreme Court granted Respondents' motion. That is not true. Petitioners should be denied this Court's review based upon such a misrepresentation.[8]

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[7] See Petitioners' Appendix A, page 29.

[8] Petitioners used the word "effectively" the first time the contention was made in the text (Petition, page 4), but *not* in their version of the question presented, and they *never again* qualified the statement. Their obvious intent, guilefully, is to bolster their argument by making the supreme court decision appear to have a *judgment* finality which it does not have.

3. THERE IS NO DEPRIVATION OF DUE PROCESS OF LAW.

(a) PETITIONERS' CLAIM DOES NOT INVOLVE A PROTECTED INTEREST.

The analysis of a due process claim begins with an identification of the private interest that is affected by the alleged deprivation. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). Petitioners claim that they have been deprived of a right to be heard on alternative theories, requiring evidence, about the meaning of the contract. While the right to be heard is a fundamental element of procedural due process, *Armstrong v. Manzo*, 380 U.S. 545 (1965), it does not exist in the abstract. There must be some concrete interest, about which the claimant is entitled to present evidence, which is affected by the alleged deprivation. The question is: right to be heard about what?

Petitioners claim only that they have been deprived of the opportunity to contend, and present evidence, that the contract language in question is ambiguous. Against a holding by the Texas Supreme Court that the language is *unambiguous*, that is not a protected interest.

Petitioners' claim places the cart before the horse. They argue that they should be allowed to urge "course of performance, course of dealing or usage of trade" (Petition, page 6) to establish ambiguity. They argue that they should be allowed to present "extrinsic evidence as to the meaning of the document" (Petition, page 6). They have it backwards and wrong. Evidence of course of dealing (same as "course of performance") or usage of

trade is admissible under Texas law *only after* the court has determined as a matter of law that the language in question is ambiguous, and not for the purpose of determining ambiguity. *Lone Star Gas Co. v. X-Ray Gas Co.*, 164 S.W.2d 504 (Tex. 1942). All that has occurred below is that the Texas Supreme Court has determined that the language is unambiguous. None of Petitioners' alleged "defenses" are material and no evidence concerning them may be admitted.

Petitioners have not been deprived of any right; their complaint is about a supposed right which they never had in the first place.[9]

It is only when *material fact issues* remain to be determined, after a summary judgment is reversed, that due process may require further opportunity to be heard.[10]

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[9] Compare *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (procedural due process protects only those interests to which a person has a "legitimate claim of entitlement".)

[10] That opportunity to be heard is *fact*-oriented, and is not an issue on appeal where questions of law are involved, or where supposed fact issues are not material, or where the facts are not in dispute, is illustrated by the following cases: *Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162, 167 (2d Cir. 1991) ("Absent some indication that the moving party might otherwise bring forward evidence that would affect the court's summary judgment determination, failure to provide an opportunity to respond is not reversible error."); *E. C. Ernst, Inc. v. General Motors Corp.*, 537 F.2d 105, 109 (5th Cir. 1976) (summary judgment may be entered for the non-moving party "only in the rare case in which it is very clear that all material facts are before the reviewing court."); *Black Warrior Elec. Membership Corp. v. Mississippi Power Co.*, 413 F.2d 1221, 1226 (5th Cir. 1969)

Petitioners, as shown above, do not allege the existence of *material* fact issues. Alleged facts bearing on the issue of ambiguity are not material when the language is unambiguous. *Sun Oil Co. (Del.) v. Madeley,* 626 S.W.2d 726 (Tex. 1981).

Finally, Petitioners' own motion for summary judgment agrees with Respondents. In their motion,[11] Petitioners represented to the trial court that (1) "the construction of this contractual provision is a legal issue for the Court and can never be a jury issue;" and (2) "extrinsic evidence is admissible only if, after applying applicable rules of construction, genuine uncertainty remains as to the proper construction of the contract."

Petitioners should be bound by their representations.

(summary judgment may be entered for the non-moving party where there are no material issues of fact and the parties treat the issue of whether an agreement indemnifies a party for its own negligence as a question of law.); *Int'l Longshoremen's Ass'n v. Seatrain Lines, Inc.*, 326 F.2d 916, 920 (2d Cir. 1964) (declaration as a matter of law that agreement violates statute entitles non-moving party to judgment); *Proctor & Gamble Indep. Union v. Proctor & Gamble Mfg. Co.*, 312 F.2d 181, 190 (2d Cir. 1962) (where collective bargaining agreement expired by its own terms, there was no triable issue of fact and holding that union could not compel arbitration required entry of judgment for company even in absence of cross-motion); *First Nat'l Bank v. Maryland Cas. Co.*, 290 F.2d 246, 251-52 (2d Cir. 1961) (where all issues were before the court and no material issue of fact is disputed, summary judgment may be granted to non-movant).

[11] See Respondents' Appendix E, pages App. 52, 53.

(b) PETITIONERS HAVE NOT SHOWN A DEPRIVATION: THERE IS NO FINAL JUDGMENT.

Although Petitioners have misrepresented that there is a judgment finality to the rights of the parties by their oft-repeated statement that Respondents have been *granted* a partial summary judgment, there is no final judgment, partial or otherwise. The reversal of Petitioners' summary judgment and remand to the trial court is not the kind of "proceeding which is to be accorded finality," *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950), to which the due process right might independently apply.[12] The Texas Supreme Court has said, in effect, "If the NL-Getty contract applies, then it has the meaning which we say it has; it is up to the trial court to determine whether it applies."[13]

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[12] Petitioners' one brush with "the requirement of finality," found in footnote 4 (Petition, page 5), is not supported by the cases which they cite. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) involves considerations surrounding an interlocutory appeal under 28 U.S.C. § 1291, and does not support equating a *remand* for trial, after deciding a law question, with a final judgment. *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327 (1975) is a stay order by one justice of a prior restraint on free speech. Justice Blackmun concluded that a delay in a state court review was intolerable and amounted to a decision that the restraint could remain in effect during the delay. That is not remotely analogous to the circumstances of this case.

[13] Note that the court specifically refused to hold that Getty was an additional insured by virtue of the language in question (Petitioners' Appendix A, page 29), considering that to be a "coverage" question. The fact-based defenses which Petitioners may allege about whether *coverage* exists, if the contract does apply, are preserved.

The question, more particularly, involves the application of the doctrine of the law of the case. *See Insurance Group Comm. v. Denver & R.G.W.Ry.Co.*, 329 U.S. 607 (1947). Technically, when a summary judgment is reversed on a question of law, no facts have been determined on the merits. The appellate court is announcing that if the facts at trial, on remand, are the same as the facts on which the summary judgment was based, then the determination of the law question by the appellate court will control the result on remand. The "law of the case" applies to govern the trial, *if on the same facts.* See *Hudson v. Wakefield,* 711 S.W.2d 628 (Tex. 1986). *Compare Pubali Bank v. City Nat'l Bank,* 777 F.2d 1340 (9th Cir. 1985) (it is proper on remand to enter summary judgment for the plaintiff based upon the law of the case unless the defendants produce new evidence to establish the existence of a material fact).

While, realistically, the language of the NL-Getty contract will not change, technically there is nothing to prevent the Petitioners from *contending* that different facts apply than those which were considered in connection with their summary judgment motion. The *opportunity to contend,* even with the smallest chance of success, is the *sine qua non* of due process. *Pennoyer v. Neff,* 95 U.S. 714 (1877); *Grannis v. Ordean,* 234 U.S. 385, 394 (1914).

To be sure, Respondents now contend and will contend at trial that the facts (the contract language) cannot change and that the law of the case will prevent Petitioners from claiming ambiguity in the insurance and indemnity provisions of the contract and from claiming

that the additional insured provision supports the indemnity. Nevertheless, until the trial reaches its conclusion without different evidence (such as that an altogether different contract applied to the circumstances which gave rise to the claim),[14] Petitioners will have an opportunity to be heard. That is due process.

Neither of the other cases relied on by Petitioners is on point. Neither involves a question of contract construction. Both involve actual judgments *against* the party who moved for summary judgment. That is a finality not found in this case. Thus, in *Prepo Corp. v. Pressure Can Corp.*, 234 F.2d 700 (7th Cir. 1956), judgment was entered for the non-movant in the trial court; and in *Mingus Constructors v. United States*, 812 F.2d 1387 (Fed. Cir. 1987), judgment was entered for one party on cross-motions for summary judgment. Those cases add nothing to Petitioners' contention.[15]

(c) PETITIONERS PLACED THE ISSUE BEFORE THE COURT.

In their Amended Motion for Summary Judgment, Petitioners specifically requested a judicial construction

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[14] Respondents do not say that there is a different contract. They say only that Petitioners will have the opportunity to present that kind of evidence, if it exists.

[15] The final judgments found in *Prepo* and *Mingus* make clear why Petitioners misrepresented that the Texas Supreme Court granted Respondents' motion for partial summary judgment. That is the only way they could argue that *Prepo* and *Mingus* apply to this case. That is an inexcusable abuse of their duties as officers of the Court.

of the contract language (See Respondents' Appendix E, pages 3-8), advancing a particular construction. Both appellate courts in Texas rejected Petitioner's construction and held that the language had another meaning entirely, as a matter of law. There is no due process right which would prevent a court from declaring the plain meaning of unambiguous language in a document, particularly where the party complaining of a supposed absence of due process invoked the processes of the court to obtain a construction in the first place. Petitioners made the choice of seeking summary judgment on one theory of construction; they cannot now complain that they could have advanced other theories, when the choice of procedure was theirs. See *Gutierrez-Rodriguez v. Cartagena,* 882 F.2d 553 (1st Cir. 1989) (defendant in civil rights case not denied due process when he was not allowed to testify at trial after having asserted Fifth Amendment in pre-trial discovery).

Importantly, the result would have been the same had Respondents *not* filed a motion for partial summary judgment on the construction ultimately adopted by the Texas courts. It would be a strange anomaly to penalize Respondents for filing their motion, when the result would have been the same had they not filed it.[16]

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[16] Note that the question presented, as restated by Respondents, removes from consideration the existence of Respondents' partial motion for partial summary judgment. It is truly irrelevant to the issue before the Court.

(d) PETITIONERS WERE GIVEN ADEQUATE NOTICE AND OPPORTUNITY TO RESPOND.

Respondents' motion for partial summary judgment was filed, heard and denied long prior to Petitioners' motion. The arguments made by Respondents in their motion (later ordered to be a part of *Petitioners'* summary judgment record as a *response* – see Respondents' Appendix C), gave Petitioners adequate notice of the arguments that the contract language was unambiguous, and meant exactly what the court of appeals and supreme court later said it meant. By placing an extreme and patently unreasonable construction on the language, and by seeking summary judgment based on such construction, Petitioners in fact *deprived themselves* of the opportunity to present alternate arguments. Manifestly, Petitioners have not shown that either Respondents or the Texas courts deprived them of *any* substantial right.

The case on which Petitioners principally rely, *Fountain v. Filson*, 336 U.S. 681 (1949), holds merely that an appellate court cannot *find facts* and then enter or instruct judgment for the non-movant, where no cross-motion was filed, when the point on which the summary judgment was granted is reversed. The sole question on appeal in *Fountain* was whether New Jersey law would permit the imposition of a resulting trust under the circumstances presented in the complaint and accompanying documents. The court of appeals, however, after overturning the lower court on that law point, proceeded to review the facts disclosed in the depositions on file, and instructed entry of a judgment for the plaintiffs. That is not what the Texas Supreme Court has done in this

case. The Texas court has not decided any disputed fact question. It has only stated what the words of the contract mean, which is a question of law. While it is clear that an appellate court may not finally declare matters of *fact* on an appeal of a summary judgment, *Gulbenkian v. Penn,* 252 S.W.2d 929 (Tex. 1952), no such prohibition inhibits declarations of matters of *law.*

The United States Fifth Circuit Court of Appeals case relied on by Petitioners, *Landry v. Airline Pilots Ass'n Int'l,* 901 F.2d 404, 437-38 (5th Cir. 1990), *cert. denied,* 111 S.Ct. 244 (1990) is not different from *Fountain.* The Fifth Circuit court made *fact findings* on a summary judgment record and recognized its mistake on rehearing. Notably (see footnote 2 on Motion For Rehearing, page 437), the Court confirmed a holding on a law point relating to the existence of a duty (that a party "clearly did possess fiduciary duties"), and reserved for trial determination the question of whether the duty had been breached. Here the Texas Supreme Court has ruled that the contract has a certain meaning and has reserved for trial determination the question of whether the contract, so construed, will be given effect.

None of the "notice" cases cited by Petitioners is on point.[17] All involve various circumstances relating to the ten-day notice requirement of Fed. R. Civ. P. 56(c) and/or *sua sponte* judgments, with or without written motions. Petitioners had adequate notice of Respondents' contention that the contract language was unambiguous, and of the court of appeals' determination that the language was

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[17] See notice cases cited in Petition, pages 9-10.

unambiguous. They were amply warned that the Texas Supreme Court could decide the issue against them on the same basis.

Contrary to Petitioners' contention based on *Armstrong v. Manzo*, 380 U.S. 545 (1965), the Texas Supreme Court did not here "alter[] the burdens of proof." (Petition, page 11). The contention assumes that proof would be offered by Respondents, failing which they "would not prevail" (Petition, page 11). However, no proof is required (or allowed, for that matter) to demonstrate that the contract language is unambiguous. *Lewis v. East Texas Finance Co.*, 146 S.W.2d 977 (Tex. 1941). Since the language is unambiguous, *neither* side may offer proof of its meaning, one way or the other.

4. PETITIONERS' NOVEL DUE PROCESS THEORY WOULD DEPRIVE COURTS OF AN INHERENT POWER AND WOULD HARM THE ADMINISTRATION OF CIVIL JUSTICE.

Petitioners new due process theory would have a deleterious effect on the administration of justice and would accomplish an absurd result: in any case involving an appeal from a summary judgment, where the judgment depended upon the construction of a document (and no cross-motion for final summary judgment on the same issue was involved), the appellate court would be prevented from declaring the meaning of the document if that meaning was different from the meaning supported by the appellee/summary judgment movant. The court would be forced to say: "We can't tell you what the contract means; it just doesn't mean what the appellee

says." That would be a grossly inefficient result, requiring a trial even if the contract language is unambiguous, and would deprive the court of its inherent power, in the resolution of cases and controversies, to declare matters of law. The declaration of matters of law is the essence of the judicial power. *Marbury v. Madison*, 5 U.S. 137 (1 Cranch 137) (1803); *Muskrat v. United States*, 219 U.S. 346, 356 (1911). *See also, Morrow v. Corbin*, 62 S.W.2d 641, 645 (Tex. 1933); *Eichelberger v. Eichelberger*, 582 S.W.2d 395 (Tex. 1979). Moreover, the constitution and laws of the State of Texas give the Texas Supreme Court express power to review questions of law arising in cases decided by the Texas courts of appeals. Tex. Const. art. V, § 3; Tex. Gov't Code Ann., § 22.001 (Vernon 1987). The Texas Supreme Court, therefore, has at minimum the inherent, but more specifically the *express*, judicial power to declare as a matter of law the meaning of an unambiguous contract when that issue is put squarely to it, as it was in this case.[18] Petitioners' position would prevent such a

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[18] This principle is illustrated by a case in which current counsel for Petitioners Youell & Companies was on the other side of the question, representing NL. In *NL Industries, Inc. v. GHR Energy Corp.*, 940 F.2d 957 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 873, in an appeal by NL from a summary judgment, the Fifth Circuit Court, applying Texas law, reviewed two separate provisions of a contract, finding one construed by the movant to be a damage limitation provision to be unambiguous against the movant, and the other to be ambiguous. It reversed and remanded, directing a trial as to the parties' understanding of the meaning of the latter provision. Thus, the court exercised its power to determine matters of law. The effects were (1) GHR would not be entitled to contend on remand that the first provision was a damage limitation provision nor would GHR be entitled to introduce evidence to attempt to claim ambiguity;

declaration, based on the fact that Respondents filed a motion for partial summary judgment seeking the same declaration. Since the court would have the power to declare the meaning of the contract if Respondents had *not* filed a motion for partial summary judgment, why should a limitation exist on the court's power when Respondents *did* file such a motion (but which was not involved in the appeal)? There is no such limitation. See *R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517 (Tex. 1980).

Petitioners' new due process claim would also eviscerate the law of the case doctrine by depriving appellate courts of the power to declare matters of law, when reviewing summary judgments, for the guidance of lower courts on remand.

Since the analysis of a due process claim requires a balancing test, *Mathews v. Eldridge, supra; Zinermon v. Burch*, 494 U.S. 113 (1990), one of the elements of Petitioners' claim to be weighed in the balance is the adverse effect it would have on the administration of civil justice. Petitioners have not demonstrated that they have been denied an opportunity to present their construction of the contract language. They have presented their construction and both Texas appellate courts have found it wanting. Their interest in presenting additional, putative (and, frankly spurious) contentions is far outweighed by the efficient exercise of the judicial power embodied in a

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and (2) both parties would get a trial on the meaning of the ambiguous provision. The power of the court to declare the meaning of the unambiguous provision *against* the construction advanced by the movant (GHR) apparently was not questioned.

court's declaration of matters of law (here, the meaning of unambiguous contract language).

No deprivation of due process exists in the exercise of that judicial power. No "fundamental unfairness" has been shown. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985), citing *Mackey v. Montrym*, 443 U.S. 1 (1979).

CONCLUSION

Petitioners have not shown any reason why certiorari should be granted. The Court should deny the petition.

Respectfully submitted,

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